



THE KULLMAN FIRM

A PROFESSIONAL LAW CORPORATION

CLIENT E-NEWSLETTER

SPECIAL BULLETIN

The Kullman Firm Comments on Proposed DOL Regulations Regarding Affirmative Action for the Disabled

On December 23, 2011, we published a special bulletin regarding newly proposed regulations from the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") which would dramatically expand the obligations of federal contractors and subcontractors towards individuals with disabilities. Yesterday we submitted comments on behalf of The Kullman Firm to the OFCCP regarding their newly proposed regulations. A copy of the letter is attached, and we encourage you to take the time to read through the comments, if for no other reason than to get a better appreciation of both the enormous administrative burdens that would be imposed upon federal contractors and subcontractors if these regulations are implemented, and the greatly enhanced risk of exposure to litigation from disabled applicants who are rejected for employment (and existing disabled employees who are denied promotions or other training opportunities). We will keep you advised of any future developments with these proposed regulations.

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February 1, 2012

Ms. Debra A. Carr
Director, Division of Policy, Planning,
and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking (Section 503 of the Rehabilitation Act of 1973)

Dear Ms. Carr:

The purpose of this letter is to provide the comments of The Kullman Firm (the "Firm") on the OFCCP's recently published Notice of Proposed Rulemaking with respect to federal contractors' affirmative action obligations for disabled persons under Section 503 of the Rehabilitation Act. Our Firm was founded in 1946 in New Orleans, Louisiana, and represents hundreds of American employers – including many federal contractors and subcontractors – in the area of labor and employment law.

As an initial matter, we certainly understand the Agency's desire to bolster hiring and advancement opportunities for persons with disabilities. After having had numerous conversations with our clients, however, we believe the methods the OFCCP has chosen to pursue its aims will impose extraordinary administrative burdens and costs upon American employers which the OFCCP has grossly underestimated. In addition, it appears inevitable that a number of these proposed regulatory changes, if implemented, will expose contractors and subcontractors to significantly increased legal exposure and risks of litigation, outweighing any potential benefits of the proposed regulations.

Underestimated Administrative Burdens/Costs:

While the proposed regulations would impose a plethora of new administrative obligations on employers too numerous to address in the scope of any one letter of reasonable length, here are some of the more notable examples:

- 41 CFR §741.42 (Pre- and post-offer invitations to applicants to self-identify as disabled): The proposed regulations would require employers to print and distribute such invitations for each individual applicant in detachable forms, and for the first time would require that two such invitations be created and distributed for all applicants receiving offers of employment. The forms would obviously have to be gathered, filed and tracked on an ongoing basis. The OFCCP's estimate that the total annual time that would be required per contractor for such tasks is 5 minutes strains belief past the breaking point, particularly for larger employers dealing with thousands of applicants per year.

Of more substantive importance is the fact that even the information gathered at such great expense will be of highly dubious value. Expecting applicants – or employers, for that matter – to accurately answer what amounts to a legal question -- “Are you disabled?”-- that even state and federal judges and juries have great difficulty answering is clearly unrealistic. The proposed regulations adopt the definition of “disability” from the Americans with Disabilities Act Amendments Act (“ADAAA”). That definition is very broad and may apply in a wide variety of circumstances in which the “disabled” person has no impediment to work in any environment or, more importantly, the applicant or employee may not want to consider himself or herself as disabled. Conversely, some applicants may well misapply the definition and identify themselves as disabled when they are not. Indeed, the lack of accuracy or clarity in the very notion of the term “disability,” as opposed to race or gender, is a fundamental flaw carried over to other portions of the proposed regulations.

- 41 CFR §60-741.44(b) (Detailed annual review of personnel processes): This section of the proposed regulations would require employers to annually, rather than just periodically (as under existing law), review all their personnel processes to ensure that (1) they “provide for careful, thorough, and systematic consideration” of the qualifications of disabled applicants and employees, (2) any “information and communication technology is accessible” to disabled individuals, (3) necessary modifications are made, (4) a written description of this review and modifications is included in the annual AAP update, and (5) detailed records are kept regarding each vacancy, promotion, or training opportunity for which disabled persons were considered. To estimate that such activities will take the average company a half an hour a year – as OFCCP has done – is extremely unrealistic. The OFCCP itself has said “an affirmative action program is [to be] more than a paperwork exercise.” If that is indeed to be the case, then it is more realistic to assume at least 2 to 3 days per year of work per contractor per year would be required to complete this process/practice review. Even that time would not take into account the legal expenses of a review of such a written process and policy analysis, as would almost certainly be necessary for any responsible employer.

- 41 CFR §741.44(b)(3) (Written statements of reasons for rejection of disabled candidates): This section would require employers, for the first time, to prepare “a statement of the reason” for the rejection of any disabled applicant or employee for hiring, promotion or training opportunities. No similar requirement has ever been required for unsuccessful female or minority candidates. More importantly, however, given the legal exposure potentially created by such a new type of document, great care will have to be exercised in crafting such documents,

and legal review will almost certainly have to be employed in each such case. Amazingly, the OFCCP seems to estimate that the time required for all that effort will be subsumed within the same 30-minute annual block of time allotted to the review of personnel policies. Depending upon the number of cases – and assuming employees even accurately know who their “disabled” applicants and employees are – the actual time required could be 10 or 20 times the OFCCP’s estimate per year. Additionally, requiring contractors to produce such statements would deprive them of the opportunity to engage AAP subcontractors or other third parties (including those within their own companies) to handle administrative and information-gathering responsibilities designed to “shield” covered characteristics of applicants to avoid potential discrimination, thereby finally depriving contractors of any means to avoid the potential adverse legal ramifications of injecting “knowledge of a disability” into the hiring decisionmaking process.

- 41 CFR §60-741.44(c) (Annual review and update of physical and mental job qualification standards): This section of the proposed regulations would mandate that each employer “shall adhere to a schedule for the annual review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out individuals on the basis of disability, they are job related for the position in question and are consistent with business necessity.” The proposed regulation goes on to add that the contractor must “document the methods used to complete the annual review, the results of the annual review, and any actions taken in response.” This same section further would impose the obligation (never before existing) upon employers who lawfully decline to employ individuals when doing so would pose a direct threat to their safety or that of other employees to “create a statement of reasons supporting its belief, addressing each of the criteria for ‘direct threat’ listed [above].” In its preamble to the proposed regulations, OFCCP emphasizes that employers will be expected to document the annual review and update of job qualifications standards, and adds “it is anticipated that this documentation will list the physical and mental job qualifications for [all] job openings during a given AAP year... and provide an explanation as to why each requirement is related to the job to which it corresponds.” This would be a burden of herculean proportions to any employer, particularly those with significant amounts of hiring in a variety of jobs during a given year. Again, it is difficult to imagine a responsible employer engaging in such review and documentation without the assistance of outside counsel. Even if it did not, the OFCCP’s estimate of time burden seems to include no specific allotment of time for the above-described exercise, a violation itself of the Paperwork Reduction Act, Regulatory Flexibility Act and Executive Order 13272. It would not be difficult to imagine that a responsible employer attempting to comply with OFCCP’s expectations regarding the review and justification of job standards could spend a minimum of one to two weeks per year in such an exercise. The legal expenses involved, if sought, could well run into the thousands of dollars per year.

- 41 CFR §60-741.44(f) External dissemination of policy, including outreach and linkage agreements): A fresh new set of administrative obligations are imposed upon employers in this section, including that in addition to listing all employment openings with the “Employment One-Stop Career Center” nearest the employer’s facility, it also must undertake at least three other efforts, including establishing linkage agreements with state vocational rehabilitation service agencies, establish a second linkage agreement with one of a number of

listed organizations, and consulting the Employer Resources Section of the National Resource Directory and establish a linkage agreement with one or more of the disabled veteran service organizations listed therein. It is not clear what, if any, estimate of the time and effort required by each company has been made by OFCCP, but creating and maintaining these kinds of ongoing relationships (particularly in the manner and with the detail proposed by OFCCP) could create the need for at least another part-time human resources employee on an annual basis, if not more. Again, if the OFCCP's suggested total annual cost of compliance per employer (for both Paperwork Reduction Act and other reasons) is \$473, then these linkage and outreach efforts seem not to have been considered at all.

- 41 CFR §741.44(f)(2)(vi) (Consideration of disabled applicants for all available positions): It is not entirely clear from the context of the proposed regulations whether this would be a mandatory obligation on contractors. Subsection (2) of the "External Dissemination of Policy..." section is entitled "Suggested Outreach Efforts;" in subsection (vi), however, the proposed regulation states: "The contractor, in making hiring decisions, *shall* (emphasis added) consider applicants who are known to have disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable." If this is indeed to be a mandatory provision, then the additional administrative burdens stemming from such a requirement would be immeasurable. Requiring a Human Resources staff to match up all disabled applicants' qualifications against not only the jobs they are applying for, but every other job within the organization which might have been available at the time would be extraordinarily time consuming. Indeed, that is a requirement which does not exist for any other class of individuals covered by affirmative action obligations, and would seem to fly squarely in the face of case law under the ADA. We would suggest, therefore, that the word "shall" in that subsection revert to "should." In the absence of that change, then the OFCCP's estimate of time and expense involved in compliance must be increased exponentially.

- 41 CFR §60.741.44(f)(3) and (k) (Annual review of effectiveness of outreach efforts and statistical calculations regarding disabled applicants and hires): Taken together, these two newly proposed regulations would impose significant tracking and adverse impact calculation responsibilities upon employers. The former section would require each employer to annually "review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness..." including documenting and maintaining the numbers of disabled applicants it received from all sources, including those who self-identified, and the ratios of disabled applicants who were hired as compared to both the total number of jobs filled and the total number of nondisabled applicants who were hired. Incredibly, OFCCP estimates that the time required for annually reviewing the effectiveness of a company's outreach and recruitment efforts would be 10 minutes per year. The agency is more "generous" in assuming that an effective statistical computation of all of the various categories of disabled and nondisabled applicants and job openings would require only 60 minutes per year, although such a figure has never held true for any other kind of adverse impact assessment regarding female or minority candidates. Taken collectively, the human resource time and burden imposed by these two requirements would likely be of a factor of many times greater than that estimated by the OFCCP.

- 41 CFR §60-741.44(j) (Training of certain personnel): This proposed regulation would require that “all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments and the contractor’s affirmative action program are implemented.” The regulation goes on to specify in more detail the nature of that training, yet estimates a recurring burden hours per company of five minutes per contractor. It is inconceivable how such a number could have been arrived at: Preparing the subject matter and format of that training would obviously require hours, and OFCCP does not seem to take into account the cost in man hours of the time spent by the participants in such a training program. Suffice it to say that the actual burden could amount to one or two hundred times the number estimated by OFCCP.

- 41 CFR §60-741.45 (Development of reasonable accommodation procedures.): This newly proposed regulation would mandate that each employer “develop and implement written procedures for processing requests for reasonable accommodation.” The regulation goes on to provide that the procedure shall be included in the affirmative action program, contain certain “minimum required elements, and be disseminated to all employees. The one time burden of creating such a procedure would be well in excess of the 30 minutes estimated by the OFCCP, but more importantly, the agency’s appraisal of the burden completely fails to take into account several other elements of this newly proposed regulation. First, the employer would have to provide “written confirmation of each request for a reasonable accommodation” made throughout the course of the year, and even more significantly, the regulations state that “any denial or refusal to provide a requested reasonable accommodation will be provided in writing. The written denial shall include the reason of the denial and must be dated and signed by the authorized decision maker... .” As would be the case with providing unsuccessful disabled applicants with written statements for the reasons for their rejection, crafting such documents as envisioned by OFCCP would require significant time and thought, and would almost inevitably require review by outside legal counsel to minimize legal exposure created by even the lawful and well intended inability to provide accommodations in certain contexts. It is difficult, if not impossible, to estimate the true burden of time and expense that would be imposed by this requirement, but it would certainly be in excess of OFCCP’s current estimate, which appears to be no time at all.

Again, the foregoing recitation of administrative burdens which well exceed those estimated by OFCCP are only a sampling of many contained within the proposed regulations. Suffice it to say that we believe the agency, no matter how laudable its intentions, have grossly underestimated the time and expense – imposed on both in-house human resource staff and outside legal counsel – which would result from an implementation of the regulations in their current proposed form. We strongly urge OFCCP to reconsider the foregoing requirements and adopt other methods to effectuate its aims in a more cost-effective fashion.

Creation of New Risks of Litigation and Legal Exposure:

While already referenced in certain contexts above, it must be emphasized that the implementation of the proposed regulations will unquestionably expose American employers to heightened liability – or at least the cost of associated litigation – for allegations of unlawful discrimination under the ADA and Section 503. Again, as in the case of the unanticipated administrative costs, the examples of such lawsuit-provoking provisions in these regulations are too numerous to list, but the following are some of the more obvious ones:

- 41 CFR §60-741.42(a): The requirement that each individual applicant be specifically asked if he or she is disabled on a “detachable form” will very likely plant the seed of suspicion in the mind of many unsuccessful applicants that their disability could have been a motivating factor in their rejection. The fact that the form is detachable would scarcely discourage applicants from believing hiring managers had access to the information (and, as discussed below, the requirement of a statement of reasons for non-selection be created would virtually guarantee such access). We understand that existing regulations require the extension of an invitation to applicants to self-identify, but do not require this type of individualized “tear-off” response forms. The new regulations will unavoidably call more attention to the applicants’ disability status and prompt many more legal challenges when they are not chosen for employment.

- 41 CFR §60-741.42(c): This section would require contractors to annually survey their existing employees as to whether they are or have become disabled. Such a requirement – in addition to the administrative burdens already described – would also likely increase the risk of litigation and legal liability to employers. First, even though the survey is to be anonymous, what is to stop an employee from identifying himself or herself? (a possibility which will become more real for those individuals who may be experiencing job performance difficulties, and wish to cloak themselves with additional protections – i.e., causes of action – against their employers.) Second, it is unclear how an anonymous survey makes any sense whatsoever. How would that help an employee avail himself or herself of the contractor’s affirmative action obligations if the contractor does not even know who it is to affirmatively assist? If the point of the survey is to help the contractor determine if it is meeting the new 7% goal in each job group, how will anonymous data help in that regard at all? Our concern is that the anonymous survey is but the first step toward requiring employers to annually ask each existing employee (without the cloak of anonymity) if he or she is or has become disabled; if that happens, then the risk of litigation and legal liability will increase exponentially.

- 41 CFR §60-741.44(b)(3): This proposed regulation would require that “in each case where an applicant or employee who is an individual with a disability is rejected for employment, promotion or training, the contractor shall prepare a statement of the reason as well as a description of any accommodation considered.” We are not aware of any other law or regulation, federal or state, which imposes such a burden on employers who reject candidates for employment or promotion for any other reasons – including other discriminatory reasons or protected statuses. Furthermore, it does not even appear that the obligation of preparing written

statements is limited to those situations where the disability played a role in the rejection decision! What the OFCCP is doing – for no apparent “affirmative” benefit to anyone – is asking employers to hand over a written “statement of their case” in advance of potential litigation, from which they can stray only at their own risk. As mentioned previously, this will inevitably result in employers having to seek legal counsel for assistance in most, if not all of these rejection situations, and even with such assistance, the likelihood of spawning legal challenges greatly exceeds any conceivable value stemming from applicants or employees being given these statements.

- 41 CFR §60-741.44(d): This proposed regulation would mandate that, if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee’s disability. If the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

It is impossible to understate the depth of the legal quagmire this proposal would create, intentionally or not. U.S. employers are currently spending millions of dollars training supervisors and managers not to perceive employees as disabled, and not to assume that performance problems are disability related. Now, these regulations would require that they essentially do the opposite. How are employers to “reasonably” conclude when performance problems are disability related? To meet these new obligations in good faith, therefore, employers will now have to treat most, if not all, disciplinary/performance issues involving disabled employees as disability-related, whether they are or not. Current legal doctrine under the ADA and ADAAA now require employees to request accommodation – not employers to suggest accommodation. If this proposal is enacted, then OFCCP is essentially guaranteeing that all job performance terminations (or even discipline) of disabled employees will be made to appear as though they were based on the employees’ real or perceived disabilities. The legal risks to which this proposal would expose employers are horrifying.

- 41 CFR §60-741.44(f)(2)(vi): This proposed regulation, as discussed previously, appears to require contractors to consider disabled applicants for all available positions for which they may be qualified, regardless of whether the applicants ever sought such other positions. While the regulations do not specifically address this next concern, it could reasonably be inferred that if a contractor considers the applicant for 5, 10 or 20 other positions, but still rejects the candidate, it would now have to create written statements (pursuant to 41 CFR §60-741.44(b)(3)) explaining its basis for rejection of the applicant for each of those positions. If an employer incurs legal risk by providing rejected applicants written statements regarding their rejection for one position, it requires little or no imagination to realize how significantly that liability would expand if multiple such statements are provided.

Ms. Debra A. Carr
February 1, 2012
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With all due respect, these proposed regulations represent among the most costly, burdensome and intrusive infringements upon the rights and interests of federal contractors our Firm has seen in the last three or four decades. We strongly urge the OFCCP to consider these comments, and what we assume will be hundreds or thousands of others similar in their import, and to withdraw at least the most offensive portions of the proposed regulations described herein. Thank you for your consideration.

Very truly yours,

A handwritten signature in dark ink, reading "Robert F. Spencer, Jr." with a stylized flourish at the end.

Robert F. Spencer, Jr.

RFS,jr./db